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Supreme Court
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No. 96-1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED MINE WORKERS OF AMERICA
1992 BENEFIT PLAN, *et al.*,
Petitioners,

v.

LECKIE SMOKELESS COAL COMPANY, NEW RIVER MINERAL RESOURCES COMPANY, GOULD RESOURCES, INC., ROYAL SCOT MINERALS, INC., LADY H COAL COMPANY, INC., CONSOLIDATED SEWELL, INC., SEWELL COAL COMPANY, LEIVASY MINING CORPORATION, and EASTWOOD CONSTRUCTION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court in a Chapter 11 bankruptcy proceeding may authorize a sale of the debtor's assets under section 363(f) of the Bankruptcy Code, free and clear of the petitioners' claims under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), where petitioners retain all rights against the bankruptcy estate and the proceeds of sale.

2. Whether the Declaratory Judgment Act or the Anti-Injunction Act bars a court in a Chapter 11 bankruptcy proceeding from authorizing a sale of the debtor's assets under section 363(f) of the Bankruptcy Code, free and clear of the debtor's liabilities under the Coal Act.*

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* Respondents respectfully submit that this question is not properly before this Court because it was not raised or considered in the district courts.

RULE 29.6 LISTING

The parent company of respondent Royal Scot Minerals, Inc. is Rackwood Mineral Holdings, plc. The parent companies of Leckie Smokeless Coal Company are Turley Development Company and Powhatan Development Company. None of the other respondents has any parents or non-wholly owned subsidiaries which are not already named parties.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari.

OPINIONS BELOW

The opinions of the court of appeals and the district courts below are correctly cited in the petition. However, petitioners incorrectly state that the opinion of the bankruptcy court in *Lady H* is reported at 193 B.R. 233. That opinion refers to a proposed, but never-consummated sale, not at issue in these appeals. The opinion of the

Lady H bankruptcy court on the sale at issue here is unreported, although it is incorporated in and appended to the district court's order in *Lady H*, reported at 199 B.R. 595.

STATUTES INVOLVED

In addition to the statutes listed by petitioners, the second question presented in the petition implicates the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the Anti-Injunction Act, 26 U.S.C. § 7421, both of which are reproduced in the attached appendix.

STATEMENT OF THE CASE

The facts and legal issues involved in this case are fully and accurately set forth in the opinion of the court of appeals. (Pet. App. 5a-14a). They are summarized here briefly to correct several inaccuracies contained in the petition.

A. Course of Proceedings and Disposition of the Case Below.

Each of these two cases began with a motion by a coal company in Chapter 11 bankruptcy to sell substantially all of its assets under the Bankruptcy Code sale provisions of 11 U.S.C. § 363.[1] In each case, the severity of the debtor's financial condition had led to the cessation of its business and made a successful reorganization impossible. (Pet. App. 51a, 62a). For both companies, lack of money to maintain their mines threatened the imminent deterioration of their assets and made a comprehensive sale the

[1] Each case involves the bankruptcy of a coal company and its affiliates and subsidiaries. For clarity, Leckie Smokeless Coal Company and its affiliates, New River Mineral Resources Company and Gould Resources, Inc., will be referred to collectively as "Leckie." Lady H Coal Company and its parent, Consolidated Sewell, Inc., its subsidiary, Eastwood Construction, Inc., and its affiliates, Sewell Coal Company and Leivasy Mining Corporation, will be referred to collectively as "Lady H."

only alternative to a "fire sale" liquidation. (Pet. App. 51a, 62a). Accordingly, each debtor made extensive efforts to procure bids for its assets and held public, court-approved sales. Only one prospective buyer in each case was willing to make an offer for the primary production assets. (Pet. App. 11a-13a, 14a). These buyers were independent parties, totally unrelated to the debtors and their principals. (Pet. App. 34a, 55a).

In both cases, the offers were conditioned on the sale being "free and clear" of any creditor's "interest in the property" of the debtors under section 363(f) of the Bankruptcy Code.[2] In each case, a sale "free and clear" was necessary to make the sale economically feasible. Each debtor's liability to the petitioners alone was greater than the value of the proposed assets to be sold.[3] Each debtor consequently moved for an order in the bankruptcy court approving the sale of its assets "free and clear" of all liens and other interests, with payment of creditor claims to be made from the proceeds generated by the sale. *Neither order discharged the debtors of any of their obligations to petitioners or any other creditor.*

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[2] In the *Leckie* case, the only potential purchaser to express interest in the debtor's assets—respondent Royal Scot Minerals, Inc.—conditioned its offer upon the sale being made free and clear of the debtors' liabilities. In *Lady H*, the motion to sell free and clear was made as part of a motion by Lady H for permission to auction its assets to the highest bidder and before any offer to purchase was received. At the auction, only one bid was received for the assets in issue, by a purchaser not a party to these appeals. (Pet. App. 9a, 11a-12a).

[3] In *Leckie*, the district court found the purchaser's offer of $1.9 million to be fair and reasonable. (Pet. App. 34a); the *Leckie* debtor's total liability to the petitioners under the Coal Act is estimated to be $7 million at present value. (Pet. App. 33a-34a). In *Lady H*, the debtor's assets were fairly valued at $4.5 million, (Pet. App. 13a), while the debtor's obligations to the petitioners were estimated to be in excess of $9 million. The debtors also owe millions of dollars to other tax and trade creditors.

Petitioners objected to both motions, contending that their right to premiums under the Coal Act, 26 U.S.C. §§ 9701-9722, could be asserted against a purchaser of the debtors' assets as a "successor" and that any such successor liability would not be affected by a sale free and clear. The petitioners' objections in each case were withdrawn to the district court for decision.

In *Leckie,* the district court overruled the petitioners' objections on the ground that the Coal Act does not impose successor liability upon bona fide purchasers of assets. (Pet. App. 42a-44a). The *Leckie* court went on to hold that the petitioners' rights to payment under the Coal Act were both bankruptcy claims and "interests in property" under Bankruptcy Code § 363(f), and that they could therefore be the subject of a free and clear sale under section 363(f)(1), which allows property to be sold free and clear of an interest in that property when "applicable nonbankruptcy law" permits. (Pet. App. 44a-48a).

One week later, the district court in *Lady H* adopted the reasoning of the *Leckie* opinion, citing *stare decisis.* (Pet. App. 55a). The *Lady H* court also held in the alternative that, even if the Coal Act could impose successor liability upon a purchaser of assets, a purchaser could buy the debtor's property free and clear of such liability in a sale under Bankruptcy Code § 363(f)(5), which allows property to be sold clear of an interest in property if the owner of that interest "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction" for that interest. Finding liability under the Coal Act to be "compensable in money satisfaction" and finding, as did the *Leckie* court, that Coal Act premiums were both "claims" and "interests in property" which arose prior to the sale, the *Lady H* district court allowed a sale free and clear of petitioners' claims. (Pet. App. 80a).

After granting permission for an interlocutory appeal in each case and consolidating both for decision, the court of appeals affirmed on the alternative ground adopted in *Lady H*. Declining to address the broader issue whether purchasers of assets could ever be liable as successors under the Coal Act, the court held that, regardless of whether such liability existed, a purchaser could take the debtors' property free and clear of that liability in a sale under Bankruptcy Code § 363(f)(5). In reaching this holding, the court of appeals found, as did both district courts, that the petitioners' rights to premiums under the Coal Act were both bankruptcy claims and interests in property for purposes of allowing a sale free and clear. (Pet. App. 14a-19a). In addition, ruling on objections not raised by petitioners in the district court, the court of appeals held that neither the Declaratory Judgment Act nor the Anti-Injunction Act barred the district courts from issuing the sale orders.

In concluding its analysis, the court of appeals squarely addressed petitioners' concerns that allowing a sale free and clear of any putative successor liability would recreate the funding crisis that motivated the passage of the Coal Act. While suggesting that such an argument was insufficient to overcome the statutory language of the Bankruptcy Code and would be better addressed to Congress, the court of appeals noted, in fact, that "at least in circumstances such as those presented in the cases at bar, a rule permitting the issuance of free and clear orders protects [petitioners'] interests more effectively than a contrary rule" by preventing the piecemeal sale of debtors' assets and generating more funds "with which to satisfy the claims of the Fund, the Plan, and the debtors' other creditors." (Pet. App. 29a).

B. Correction of Misstatements in the Petition.

The court of appeals did not hold, as petitioners stated, that "*all* Coal Act taxes that otherwise might be imposed in the future against a nondebtor third party may be accelerated into a single pre-petition claim that can be eliminated in bankruptcy." (Pet. 3) (emphasis added). The court of appeals expressly limited its holding to extinguishing any putative *successor liability* incurred by a purchaser as a result of buying assets in a court-approved, good faith bankruptcy sale. (Pet. App. 26a) (emphasis added).

Similarly, the court of appeals did not hold that "under the Bankruptcy Code, a court can render a declaratory judgment absolving a nondebtor third party from Coal Act tax liability." (Pet. 3). The actual holding of the court of appeals was that neither "the Anti-Injunction Act nor the Declaratory Judgment Act *barred* the district courts from issuing the orders challenged here," (Pet. App. 22a) (emphasis added), and that consequently "the district courts had jurisdiction to reach the merits of the debtors' motions to sell their assets free and clear of their Coal Act obligations" and order the necessary relief, (Pet. App. 25a). Neither the court of appeals nor any of the lower courts characterized the sale orders at issue as declaratory judgments or decided whether such orders could be issued outside the context of a court-approved sale free and clear under Bankruptcy Code § 363(f).

Finally, petitioners make unsupported statements concerning their future financial ruin should the ruling of the court of appeals stand. (Pet. 3). None of petitioners' contentions is supported by evidence in the record. To the contrary, here petitioners retain all rights against the debtors and the proceeds of these sales. Moreover, as found by every court below, allowing these sales to be made free and clear will increase the amount of proceeds from which debtors can pay the claims of petitioners and other creditors. (Pet. App. 29a, 51a, 55a, 62a).

REASONS FOR DENYING WRIT

The opinion of the court of appeals in this case does not warrant the exercise of this Court's supervisory powers. The orders at issue here, allowing sales free and clear of the petitioners' claims under the Coal Act, are routine applications of the express authority of a court in bankruptcy to authorize sales free and clear under Bankruptcy Code § 363(f). No reported case identified by petitioners, or known to respondents, conflicts with the holding authorizing these sales. Nor does any provision of the Coal Act or the Bankruptcy Code exempt Coal Act premiums from this express authority to sell free and clear.

The rulings of the courts below raise no important issues justifying review by this Court. The sales in question do not threaten the orderly administration of the Coal Act. Sales free and clear affect only whatever successor liability exists under the Coal Act; they do not alter a debtor's existing liability. Because of the protections afforded both under the Coal Act and Bankruptcy Code, no company currently liable for Coal Act premiums can avoid such liability through a sale free and clear.

Nor are such sales barred by the Declaratory Judgment Act or Anti-Injunction Act. By failing to raise these claims before the district courts, petitioners have waived this issue for review. Even if the issue were not waived, the sale orders here are neither declaratory nor injunctive. In any event, the determination of taxes in bankruptcy proceedings is expressly permitted under the Declaratory Judgment Act.

I. THERE IS NO CONFLICT BETWEEN THE HOLDING OF THE COURT OF APPEALS AUTHORIZING A SALE FREE AND CLEAR OF THE DEBTORS' LIABILITIES UNDER THE COAL ACT AND THE HOLDING OF ANY OTHER FEDERAL COURT.

In the decision below, the Court of Appeals for the Fourth Circuit held that a court in a bankruptcy proceed-

ing could order the sale of substantially all of the debtor's assets free and clear of any successor liability under the Coal Act. Petitioners have cited no cases, and respondents are unaware of any cases, which conflict with this holding.

The decision of the court of appeals is consistent with those of numerous other federal courts which have allowed sales of a debtor's assets free and clear of successor liability.[4] The holding below also accords with the many prior federal decisions which allow sales free and clear of tax claims, even those supported by liens on the property of the debtor.[5] Although petitioners suggest that all taxes are entitled to "special treatment" in bankruptcy, (Pet. 22), the Bankruptcy Code makes no exception for tax claims in allowing sales free and clear of creditors' interests under

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[4] *See, e.g., WBQ Partnership v. Virginia Dept. of Med. Assistance Servs. (In re WBQ Partnership)*, 189 B.R. 97, 105-07 (Bankr. E.D. Va. 1995) (sale free and clear of state's right to recapture depreciation allowance); *In re Johns-Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) (co-insurance coverage); *American Living Systems v. Bonapfel (In re All American of Ashburn)*, 56 B.R. 186, 189-91 (Bankr. N.D. Ga. 1986) (product liability claims); *Forde v. Kee-Lox Mfg. Co.*, 437 F. Supp. 631, 632-34 (W.D.N.Y. 1977), *aff'd on other grounds*, 584 F.2d 4 (2d Cir. 1978) (civil rights claims); *see also Paris Mfg. Corp. v. Ace Hardware Corp. (In re Paris Ind. Corp.)*, 132 B.R. 504, 507-09 (D. Me. 1991) (affirming injunction against creditors pursuing successor liability against a purchaser, under the equitable powers of Bankruptcy Code § 105); *Rubinstein v. Alaska Pac. Consortium (In re New England Fish Co.)*, 19 B.R. 323, 328-29 (Bankr. W.D. 1982) (allowing a sale free and clear of debtor's successor liabilities to effectuate the Bankruptcy Code's priority scheme).

[5] *See, e.g., Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80, 83 (3d Cir. 1989) (holding that debtor's property may be sold free and clear of tax lien); *In re Oglesby*, 196 B.R. 938, 942 (Bankr. E.D. Va. 1996) (same); *In re Grand Slam U.S.A., Inc.*, 178 B.R. 460, 461, 464 (Bankr. E.D. Mich. 1995) (same); *Hargrave v. Township of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (same); *In re Healthco Int'l, Inc.*, 174 B.R. 174, 177 (Bankr. D. Mass. 1994) (same).

section 363(f). *See In re A. Cardi Constr. Co., Inc.*, 154 B.R. 403, 405 (Bankr. D.R.I. 1993) (awarding Rule 11 sanctions against state taxing authority for arguing that taxes are exempt from section 363(f), finding argument "ungrounded in law" and "completely lacking in merit").

The opinion of the court of appeals is also entirely consistent with the broad scope that this Court and other federal courts have given to the definition of a "claim" in bankruptcy proceedings. *See, e.g., Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (Congress intended to adopt the broadest possible definition of a claim, expressly including even "contingent" and "unmatured" rights to payment).[6] As many other courts have held, a tax claim arises when liability for a tax is incurred, not when the amount of that tax is assessed or becomes due.[7] As was properly recognized by the court of appeals, Coal Act premiums are not like recurring income or property tax obligations, for which future liability is contingent upon future activity or status. Under the Coal Act, the debtors' liability "was fixed at the time they filed their bankruptcy petitions—even though the amount of those premiums could not then and still cannot be precisely stated." (Pet.

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[6] Section 101(5)(A) of the Bankruptcy Code defines a "claim" to include a "right to payment, whether or not such right is . . . fixed, contingent, matured, unmatured . . . ."

[7] *See, e.g., West Virginia Dept. of Tax & Revenue v. IRS (In re Columbia Gas Transmission Corp.)*, 37 F.3d 982, 985 (3d Cir. 1994) (public utility taxes are to be considered claims upon their accrual with the purchase of property and not upon their actual assessment), *cert. denied*, 115 S. Ct. 1793, 131 L. Ed. 2d 721 (1995); *Burns v. City of Winston-Salem (In re Members Warehouse, Inc.)*, 991 F.2d 116, 118 (4th Cir. 1993) (state personal property tax was to be considered a claim when incurred pre-petition through the public listing of property ownership, although tax was not assessed, nor were tax rates set, until well after bankruptcy filing); *United Steelworkers of Am. v. Pension Benefit Guar. Corp. (In re Wheeling-Pittsburgh Steel Corp.)*, 103 B.R. 672, 693 (W.D. Pa. 1989) (federal excise tax assessed post-petition was a pre-petition claim where it arose from unpaid pre-petition claim contributions).

App. 16a n.9). Once companies are defined as "signatory operators" or "related parties" under section 9701(c) of the Coal Act and are assigned beneficiaries under section 9706, they become permanently liable for their beneficiaries' future premiums, regardless of their future activities. (Pet. App. 16a n.7) ("a coal operator remains liable for . . . premiums, even if it chooses to cease coal mining operations and to take up an entirely different enterprise").[8]

The only case put forward by petitioners as being in tension with the holding in this case, *LTV Steel Co., Inc. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298, 133 L. Ed. 2d 204 (1995), was squarely and expressly distinguished by the court of appeals below. As the court of appeals in this case stated,

> In *LTV Steel Co.*, the Second Circuit was asked to resolve two statutory issues: [1] whether a debtor could *itself* be relieved of its Coal Act obligations due to the [Coal Act] Funds' failure to file a timely proof of claim, where the debtor had filed for bankruptcy relief six years before the Coal Act was enacted, and [2] whether Coal Act premiums are taxes and therefore entitled to administrative priority pursuant to 11 U.S.C. § 503(b)(1)(B). The case in no way dealt with whether Coal Act successor liability may be extinguished pursuant to section 363(f).

(Pet. App. 27a n.17) (emphasis added).

The first holding in *LTV*—that the Coal Act Funds' claim for premiums did not arise until the enactment of the Coal Act—squarely accords with the opinion of the court of appeals in this case. In *LTV*, the debtor was in bankruptcy when the Coal Act was passed. Arguing that its new obligations under the Coal Act were merely a

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[8] The court of appeals' emphasis on the irrevocable, noncontingent nature of Coal Act liability refutes the petitioners' contention that "nothing in the court [of appeals'] opinion suggests" that it cannot be "extended to other taxes," allowing debtors to "disregard their tax obligations with impunity." (Pet. 23).

continuation of its pre-existing contractual obligations to provide health benefits to its employees, the debtor contended that its Coal Act obligations were pre-petition claims for which payment was barred because the Coal Act Funds had not filed timely proofs of claim. Rejecting this argument, the Second Circuit held that the Coal Act was not a "revival of old contractual obligations" but an entirely new statutory obligation. *Id.*, 53 F.3d at 497. As such, "*until the enactment of the Coal Act,*" the Coal Act Funds—petitioners here—had "no right to payment" and therefore no claim in bankruptcy. *Id.* (emphasis added). As expressly found by the court of appeals below, (Pet. App. 15a), *LTV*'s holding is entirely consistent with the holding below that the petitioners' Coal Act claims in this case, too, arose upon the enactment of the Coal Act.

The second holding in *LTV*—that Coal Act premiums which come due during the pendency of a debtor's bankruptcy are to be given administrative priority—is also consistent with the opinion of the court of appeals below. The court of appeals below held that each petitioner's right to payment of Coal Act premiums is a single claim for purposes of a sale free and clear. (Pet. App. 16a-17a). Far from being "utterly irreconcilable," (Pet. 26), these rulings taken together simply mean that the petitioners each have a single right to the payment of Coal Act premiums, of which a portion—those premiums coming due during bankruptcy—will be entitled to administrative priority. This result, a unitary claim divided into segments each entitled to a different payment priority, is commonplace in bankruptcy.[9] Indeed, less than two months before

[9] For example, creditors whose leases with the debtor are rejected under 11 U.S.C. § 365 have a pre-petition, unsecured claim against the debtor for damages from the breach of contract. 11 U.S.C. §§ 365(g), 502. However, a portion of the claim, the rent owed for the debtor's post-petition use of the leased premises, is entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(A). *See Thompson v. IFG Leasing, Co.*, 788 F.2d 560, 562 (9th Cir. 1986) (post-petition lease payments made prior to rejection are administrative expenses if made to preserve the

it issued the *Lady H* opinion below, the same district Court adopted *LTV*'s holding on the priority due Coal Act premiums. *Adventure Resources, Inc. v. Holland,* 193 B.R. 787, 743-96 (S.D. W. Va. 1996) (holding Coal Act premiums which come due during the pendency of bankruptcy proceedings to be entitled to administrative priority), *appeal docketed,* Nos. 96-1557, 96-1938 (4th Cir. July 8, 1996). The *Lady H* opinion, thus implicitly found no conflict between *LTV* and the holding subsequently affirmed by the court of appeals in this case.

II. THE RULING OF THE COURT OF APPEALS RAISES NO IMPORTANT ISSUES JUSTIFYING REVIEW.

The opinion of the court of appeals below raises no important issues concerning the administration of the Bankruptcy Code or the Coal Act. In this case, the court of appeals affirmed the power of a court in bankruptcy to approve the sale of debtors' assets free and clear of their creditors' claims, including the petitioners' claims under the Coal Act. The power to approve such sales free and clear is well established [10] and petitioners have cited no authority justifying an exemption for the petitioners' rights to Coal Act premiums. The Coal Act legislative history provided by petitioners makes clear that Congress foresaw that coal companies responsible for Coal Act premiums would go out of business. (Pet. 8, Pet. App. 148a). Yet, in enacting the Coal Act, Congress nowhere provided that Coal Act liabilities would be removed from the reach of any provision of the Bankruptcy Code, much less from the specific power to authorize a sale free and clear.

Allowing sales free and clear of Coal Act liabilities does not interfere with the Coal Act's purpose of assuring

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estate); *In re Bridgeport Plumbing Prods., Inc.,* 178 B.R. 563, 564-65 (M.D. Ga. 1994).

[10] *See* notes 4 and 5 above.

the "provision and funding" of health care for retired union coal miners. 26 U.S.C. § 19142. A sale free and clear under 11 U.S.C. § 363(f) does not affect a debtor's existing liabilities, but merely provides that its creditors may look only to the proceeds of such sale, and not the assets sold, for collection. The decision of the court of appeals below, far from providing a "blueprint for coal operators to use bankruptcy to avoid their Coal Act obligations," (Pet. 3), explicitly holds that the debtors' estates will remain liable for their Coal Act obligations. (Pet. App. 29a n.17, 51a n.5, 78a).[11] Each court below found the sales free and clear would become the primary source of funds from which to pay these obligations and would generate *more* funds to satisfy the claims of creditors, including the petitioners, than would otherwise be available. (Pet. App. 29a, 51a, 55a, 62a).

Moreover, the provisions of the Bankruptcy Code and the Coal Act provide ample protection against petitioners' enunciated fear that the sale free and clear process will be abused. In order for a court in bankruptcy to exercise its fundamental authority to approve the sale of substantially all of the assets of a debtor, it must hold an evidentiary hearing to determine whether the debtor has met its burden of establishing that "a sound business purpose

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[11] The opinion of each court below emphasizes that this is not a case involving the *discharge* of a debtor's Coal Act liabilities. Although all the decisions below hold that future Coal Act premiums are claims for purposes of a sale free and clear, they do not hold that these premiums are dischargeable under Bankruptcy Code §§ 727, 1141 (discharging liabilities incurred both before and during bankruptcy). Prior decisions in the Fourth Circuit Court of Appeals have similarly ruled that a liability may be a claim for some bankruptcy purposes without necessarily being a claim for purposes of discharge. *See, e.g., Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198, 203 (4th Cir.), *cert. dismissed sub nom. Joynes v. A.H. Robins Co., Inc.*, 487 U.S. 1260 (1988) (holding tort claimants possessed a "claim" for purposes of being subject to the automatic stay, but explicitly declining to decide whether that claim would be dischargeable upon termination of bankruptcy).

dictates such action." *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983); *see also Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986). Such a finding may be made only if the debtor demonstrates that: "(1) a sound business reason or emergency justifies a pre-confirmation sale; (2) a sale has been proposed in good faith; (3) adequate and reasonable notice of the sale has been provided to parties-in-interest; and (4) the purchase price is fair and reasonable." *WBQ Partnership v. Virginia Dept. of Med. Assistance Servs. (In re WBQ Partnership)*, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 179 (D. Del. 1991). The courts below held that the debtors in these cases met this burden. These protections and the similar protections provided by the Coal Act [12] fully safeguard the integrity of the sale process.

III. NEITHER THE DECLARATORY JUDGMENT ACT NOR THE ANTI-INJUNCTION ACT BARS THE SALE ORDERS AFFIRMED BY THE COURT OF APPEALS.

Petitioners' second question presented is not appropriate for review by this Court because petitioners did not raise it in the district courts below and because no court below has, in fact, issued a declaratory judgment.

Petitioners contend that the sale orders affirmed by the court of appeals are "declaratory judgments absolving a non-debtor" from future Coal Act liability. (Pet. i). As such, petitioners argue that these orders are barred by restrictions in the Declaratory Judgment Act and Anti-Injunction Act against declaring or enjoining the collection of federal taxes.

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[12] These protections are similar to those provided by the Coal Act's section on "sham transactions," 26 U.S.C. § 9722, which voids the effect of any transaction whose purpose is to "evade or avoid" Coal Act liability.

First and foremost, the applicability of the Declaratory Judgment and Anti-Injunction Acts to these orders is not properly before this Court. Petitioners did not raise either statute before the district court below. As neither statute is jurisdictional, the failure to raise them below precludes appellate review, absent allegations of plain error or miscarriage of justice not at issue here. *See Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir.), *cert. denied sub nom. Willingham v. Sac and Fox Nation*, 116 S. Ct. 57, 133 L. Ed. 2d 21 (1995) (failure to raise the "applicability of the Anti-Injunction Act in the district court . . . precludes review except for the most manifest error."); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224-25 (8th Cir. 1987) ("failure to assert [the Anti-Injunction Act] in the District Court bars [appellant] from obtaining review of this issue").[13]

Second, even if the issue could be properly considered upon review, the Declaratory Judgment Act and Anti-Injunction Act are not implicated here, as the sale orders in this case are not declaratory judgments. A court issues a declaratory judgment when, rather than providing the prevailing party with coercive relief, such as a judgment for damages or an injunction, it provides only a declaration of the parties' rights and obligations. *See* 10A Charles Wright, *et al.*, *Federal Practice & Procedure* § 2751 (1982). Here, neither district court below premised its jurisdiction upon the Declaratory Judgment Act or characterized the relief it was granting as declaratory; instead, each district court rested its authority solely upon the provisions of Bankruptcy Code § 363. Far from being mere declarations regarding the petitioners' rights to future

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[13] As the Declaratory Judgment Act and the Anti-Injunction Act are coextensive, *Wyoming Trucking Ass'n v. Bentsen*, 82 F.3d 930, 932-933 (10th Cir. 1996); *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983), the holdings of *Sac and Fox Nation* and *Airlines Reporting* apply equally to petitioners' failure to raise the Declaratory Judgment Act in the district courts.

Coal Act premiums, these sale orders authorize the pending transfer of substantially all of the debtors' assets out of the bankruptcy estates in return for fair and reasonable value from the purchasers.

Third, even if applicable, the Declaratory Judgment Act provides an express exemption for the determination of taxes under Bankruptcy Code § 505, which authorizes a court in bankruptcy to determine "the amount or legality of any tax." Bankruptcy Code § 505(a)(1).[14] Section 363, which allows the bankruptcy court to approve a sale free and clear of creditors' interests, does not exempt taxes, and section 505 expressly states that a bankruptcy court can determine "the amount and legality of any tax." The decisions depicted by the petitioners as conflicting with the court of appeals' ruling merely caution against reading the broad language of Bankruptcy Code § 505 as an *independent* grant of authority to determine non-debtor tax liability. *Brandt-Airflex Corp. v. Long Island Trust Co. (In re Brandt-Airflex Corp.)*, 843 F.2d 90, 95-96 (2d Cir. 1988); *United States v. Huckabee Auto Co.*, 783 F.2d 1546, 1549 (11th Cir. 1986) (court cannot shield individual owner from penalty for failure to properly withhold taxes). In neither case below was the court's authority premised solely upon section 505; rather, in each case, the district court expressly relied upon its authority to approve a sale free and clear under Bankruptcy Code § 363. These opinions are, therefore, irrelevant to the decision of the court of appeals.

Fourth, as the court of appeals found, this Court's decision in *South Carolina v. Regan*, 465 U.S. 367 (1984), provides an exception to the Anti-Injunction Act where a party has "no alternative legal way" of contesting a tax.

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[14] Although neither district court below based its authority to approve these sales on section 505, relying instead only on the power to sell free and clear under section 363, section 505 is nonetheless applicable here by its terms.

In their submission, petitioners have not contested that respondents have "no alternative legal way" of challenging the successor Coal Act liabilities here in question. The cases cited by petitioners to undercut the court of appeals' reliance on *Regan* are not to the contrary. These cases merely hold that *Regan* applies only when parties contest whether a tax is "legal, due and owing." *American Bicycle Ass'n v. United States (In re American Ass'n)*, 895 F.2d 1277, 1286 (9th Cir. 1990); *LaSalle Rolling Mills, Inc. v. IRS (In re LaSalle Rolling Mills, Inc.)*, 832 F.2d 390, 392 (7th Cir. 1987). Here, respondents challenged in every court below whether successor Coal Act liability may be imposed under these circumstances and thus whether the petitioners would be legally owed Coal Act premiums by the purchasers.

IV. THERE IS NO CONFLICT BETWEEN THE ALTERNATIVE HOLDING OF BOTH DISTRICT COURTS BELOW AND THE HOLDING OF ANY OTHER FEDERAL COURT.

Each of the district courts below held, based upon a statutory construction of the Coal Act, that the Coal Act itself does not impose successor liability upon a purchaser of assets in an arm's length, good faith transaction, such as each of these sales. The court of appeals below reserved this Coal Act interpretation issue for another day. Petitioners have cited no cases, and respondents are unaware of any cases, which conflict with the district courts' holding. There is therefore an independent basis upon which to let stand the ruling of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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